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STATE CONTROL OF FOREIGN CORPORATIONS

One of the most frequently repeated of famous *obiter dicta* is that of Chief Justice Taney in the case of *Bank of Augusta v. Earle*.¹

"It is very true, that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."

This statement was purely *obiter*, for the decision, which upheld the validity of a purchase in Alabama by the agents of certain corporations of other States of bills of exchange drawn there upon payees in New York, did not necessarily involve an affirmance or denial of the power of foreign corporations to migrate, but merely of their capacity to empower agents to make purchases for them outside the States of their creation. On this point the Chief Justice said:

"Now, natural persons, through the intervention of agents, are continually making contracts in countries in which they do not reside; and where they are not personally present when the contract is made; and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract, within the scope of its limited powers, in a sovereignty in which it does not reside, provided such contracts are permitted to be made by them by the laws of the place?"

The discussion then ran on to the question whether or not by the comity of nations, and between the States, corporations of

¹ 13 Peters, 519-589.

one State were permitted to make contracts in another, and it was noted in passing that "in England, from which we have received our general principles of jurisprudence, no doubt appears to have been entertained of the right of a foreign corporation to sue in its courts," and that "it has been decided in many of the State courts, we believe in all of them where the question has arisen, that a corporation of one State may sue in the courts of another."²

In the argument at the bar, Mr. Webster said:

"My learned friend says, indeed, that suing and making a contract are different things. True; but this argument, so far as it has any force, makes against his cause; for it is a much more distinct exercise of corporate power to bring a suit, than by an agent to make a purchase. What does the law take to be true, when it says that a corporation of one State may sue in another? Why, that the corporation is there, in court, ready to submit to the court's decree, a party on its record. . . .

"The truth is, that this argument against the power of a corporation to do acts beyond the territorial jurisdiction of the authority by which it is created is refuted by all history as well as by plain reason.

"What have all the great corporations in England been doing for centuries back? The English East India Company, as far back as the reign of Elizabeth, has been trading all over the Eastern world. That company traded in Asia, before Great Britain had established any territorial government there, and in the other parts of the world, where England never pretended to any territorial authority. The Bank of England, established in 1694, has been always trading and dealing in exchanges and bullion with Hamburg, Amsterdam and other marts of Europe. Numerous other corporations have been created in England, for the purpose of exercising power over matters and things, in territories wherein the power of England has never been exerted. The whole commercial world is full of such corporations, exercising similar powers, beyond the territorial jurisdiction within which they have legal existence."

The Chief Justice yielded to this argument. "We think it is well settled," he wrote, "that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another and to sue in its courts; and that the same law of comity prevails among the several sovereignties of this Union."

This conclusion demonstrated, as Mr. Webster pointed out, the fallacy of the proposition that a corporation can have no

² 13 Peters, 590.

existence beyond the limits of the State where it is organized, and the recognition of such existence has been almost universal from the date of that decision to the present time.

In an early case in New York, the highest court of that State recognized and affirmed the right of its citizens to go into an adjoining State and there procure a charter for the express purpose of carrying on business in the State of their residence; and the right of a State to grant to persons within its jurisdiction a corporate character and capacity to be exercised either within or without its territorial bounds was asserted. "It cannot enlarge its own jurisdiction," said the court, "but it can confer general powers to be exercised within its bounds, or beyond them, wherever the comity of nations is respected. For the purposes of commerce such a commission is regarded like a government flag, as a symbol of allegiance and authority; and it is entitled to recognition abroad until it forfeits recognition at home."³

The migrating tendencies and powers of corporations were recognized in *Canada Southern Ry. Co. v. Gebhard*,⁴ where Chief Justice Waite, after repeating the dictum from *Bank of Augusta v. Earle*, that "a corporation 'must dwell in the place of its creation, and cannot migrate to another sovereignty,'" proceeded to demonstrate its inaccuracy by adding, "though it may do business in all places where its charter allows and the local laws do not forbid."⁵ But wherever it goes for business it carries its charter, as that is the law of its existence,⁶ and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country,⁷ but, if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken, both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation."

³ *Merrick v. Van Sanford*, 34 N. Y., 208.

⁴ 109 U. S., 527-537.

⁵ *Railroad v. Koontz*, 104 U. S., 12.

⁶ *Relf v. Rundel*, 103 U. S., 226.

⁷ *Paul v. Virginia*, 8 Wall., 168.

In the case of *Adams Express Company v. Ohio*,⁸ on a petition for a reargument of the cases involving taxation of express companies,⁹ Mr. Justice Brewer, delivering the opinion of the court, said:

"It may be true that the principal office of the corporation is in New York, and that for certain purposes the maxim of the common law was '*mobilia personam sequuntur*,' but that maxim was never of universal application and seldom interfered with the right of taxation. . . . It is also true that a corporation is, for purposes of jurisdiction in the Federal courts, conclusively presumed to be a citizen of the State which created it, but it does not follow therefrom that its franchise to *be* is for all purposes to be regarded as confined to that State. For the transaction of its business it goes into various States, and wherever it goes as a corporation it carries with it that franchise to *be*. But the franchise to *be* is only one of the franchises of a corporation. The franchise to *do* is an independent franchise, or rather a combination of franchises embracing all things which the corporation is given power to do, and this power to *do* is as much a thing of value and a part of the intangible property of the corporation as the franchise to *be*. Franchises to *do* go wherever the work is done."

It was accordingly held in that case, that, in determining the value of that proportion of the capital of the Adams Express Company, organized in New York, which was employed in business in Ohio, Indiana and Kentucky, respectively, it was lawful to include not merely the tangible value of the property, but that proportion of the intangible property which the value of the tangible property in one State bore to the aggregate of the tangible property in all the States.

The legislatures of almost all the States have enacted regulations based on a recognition of the power of corporations to migrate and establish and conduct their business in States other than that in which they are incorporated. Not very long after the decision in *Bank of Augusta against Earle*, the United States Supreme Court was confronted with a case where a corporation of Indiana had assumed to migrate from that sovereignty to Ohio, and an action was brought in the latter State to recover upon a contract made by the corporation within that State, process being served upon an agent of the corporation then within that State, on which judgment was entered against the company. In an action against the corporation on such judgment in the

⁸ 166 U. S., 185.

⁹ Reported 165 U. S., 255.

United States Court within the State by which defendant was incorporated, the judgment sued on was challenged upon the ground that no jurisdiction over the corporation could be obtained by service of process on it in Ohio.

The court said that while the corporation, existing only by virtue of a law of Indiana, could not be deemed to pass personally beyond the limits of that State, it could submit itself to the jurisdiction of that State by appointing an attorney to appear there; and it was held on the facts of the case, that by entering into the State of Ohio and transacting business under its laws, the corporation had in effect, consented to be sued in that State.¹⁰

Mr. Justice Curtis, writing the opinion of the court, said:

"A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State.¹¹ This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other States, and by this court, provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense."

Corporations continued to migrate, and to an increasing degree the business of the country was conducted through association in corporate form. The States availing of the right pointed out in the *Bank of Augusta* case, enacted legislation modifying and regulating the comity by virtue of which corporations were permitted to do business in foreign States, and in the case of *Paul against Virginia* (8 Wall., 168), there was squarely presented to the Supreme Court the question whether or not there were any limitations upon the power of a State to regulate the transaction of business within its jurisdiction by corporations organized under the laws of other sovereignties. The court held that, as a corporation of one State had no absolute right of recognition in other States, but depended for such recognition and the enforcement of its contracts on their assent, it followed that such assent might be granted upon such terms and conditions as those States might think proper to impose. "They may exclude the foreign corporation entirely," said Mr. Justice Field, in delivering the unanimous opinion of the court, "they may restrict its business to particular localities, or they may exact such se-

¹⁰ *Lafayette Ins. Co. v. French*, 18 How., 404, 407.

¹¹ 13 Pet., 519.

curity for the performance of its contracts with their citizens as, in their judgment, will best promote the public interests. The whole matter rests in their discretion."

The contention was made that the statute of Virginia under consideration in that case regulating the character of corporations which should be allowed to carry on business in the State of Virginia, was in conflict with that clause of the Federal Constitution which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States;" but the answer was made that corporations are not citizens within the meaning of that provision. "The term citizens as there used applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature and possessing only the attributes which the legislature has prescribed."

This decision has been uniformly followed by the Supreme Court, and has been very recently reaffirmed in the case of *Hammond Packing Co. v. Arkansas*,¹² where the court upheld, as applicable to and binding upon a foreign corporation theretofore licensed to do business in Arkansas, a statute of Arkansas which made it a crime for any corporation, foreign, or domestic, to become a member of or party to any pool, trust, agreement, combination, or understanding, made within the State or elsewhere, to regulate or fix, either within the State or elsewhere, the price of any commodity within the State or elsewhere; or to become a member of or party to, any agreement, contract, combination, or association made within the State or elsewhere, to fix or limit, either within the State or elsewhere, the amount or quantity of any article of manufacture, etc. Mr. Justice White, in delivering the unanimous opinion of the court, said:

"As the State possessed the plenary power to exclude a foreign corporation from doing business within its borders, it follows that if the State exerted such unquestioned power from a consideration of acts done in another jurisdiction, the motive for the exertion of the lawful power did not operate to destroy the right to call the power into play. This being true, it follows that, as the power of the State to prevent a foreign corporation from continuing to do business is but the correlative of its authority to prevent such corporation from coming into the State, unless by the act of admission some contract right in favor of the corporation arose, . . . it follows that the prohibition against continuing to do business in the State because of acts done be-

¹² 212 U. S., 322.

yond the State was none the less a valid exertion of power as to a subject within the jurisdiction of the State."

The unlimited extent of the power of the States recognized by the Supreme Court is strikingly illustrated by the decision in the case of *Security Mutual Life Insurance Co. v. Prewitt*,¹³ where the constitutionality of a statute of Kentucky was upheld which enacted that, before authority is granted to any foreign insurance company to do business in the State, it must file with the commissioner, a resolution of its directors consenting that service of process upon any agent of the company within the State or upon the commissioner of insurance, in any action brought or pending in the State, shall be a valid service upon the company; but if the company should, without the consent of the other party to any suit brought by or against it in any court of the State, remove the same to any Federal Court, or institute any suit or proceeding against any citizen of Kentucky in any Federal Court, it should be the duty of the commissioner to forthwith revoke all authority to such company to do business within the State. The court had previously held that a statute requiring a foreign corporation, as a condition to obtaining a license to do business within the State, to stipulate in writing that it would not remove into the Federal courts any suits brought against it in the State courts was void, because it made the right to do business under the license or contract depend upon the surrender by the corporation of a privilege secured to it by the Constitution.¹⁴

But such ruling was distinguished by the court upon the ground that, while a State might not require a corporation to so stipulate in advance, it was perfectly constitutional for it to enact that if a foreign corporation did remove a case into the Federal Court or bring a suit there, its license should be revoked. The result of this decision is to enable a State to compel a foreign corporation to refrain from resorting to the Federal Courts in controversies brought by or against it, or else to cease to do business within that State, that is, to make its continuance within a State depend upon the practical surrender of a right which the Supreme Court itself had declared was secured to it by the Constitution.

¹³ 200 U. S., 446; also 202 U. S., 246.

¹⁴ *Insurance Co. v. Morse*, 20 Wall., 455; *Doyle v. Continental Ins. Co.*, 94 U. S., 535; *Barron v. Burnside*, 121 U. S., 181; *Southern Pacific Co. v. Denton*, 146 U. S., 202-7; *Barrow v. Kane*, 170 U. S., 100; *Blake v. McClung*, 172 U. S., 239-255.

Not only has the Supreme Court held that corporations are not citizens within the provisions of Section 2 of Article IV of the Constitution, which secure to the citizens of each State "the rights, privileges and immunities of citizens in the several States," but it has also held that they are not "citizens" within that provision of Section 1 of the Fourteenth Amendment to the Constitution which declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."¹⁵ The court has, however, held them to be "persons" within those provisions of the same section of the Fourteenth Amendment which declare that no State shall "deprive any person of life, liberty or property without due process of law,"¹⁶ nor "deny to any person within its jurisdiction the equal protection of the laws."¹⁷ The equal protection of the laws which corporations may claim is, however, only such as is accorded to similar associations within the jurisdiction of the State.¹⁸ Corporations are, of course, also entitled to the benefit of the provisions of Section 10 of Article I of the Constitution, which prohibit a State from passing any law impairing the obligation of contracts. This section furnished the basis for the decision in *American Smelting and Refining Company v. Colorado*,¹⁹ where it was held that although a State may impose different liabilities on foreign than those imposed on domestic corporations, a statute requiring foreign corporations to pay a fee based on their capital stock for the privilege of entering the State and doing business therein and thereupon to be subjected to all liabilities and restrictions of domestic corporations, amounts to a contract with foreign corporations complying therewith that they will not be subjected during the period for which they are admitted to greater liabilities than those imposed upon domestic corporations, and that a subsequent statute imposing higher annual license fees on foreign, than on domestic, corporations for the privilege of continuing to do business, is void as impairing the obligation of such contract, as respects those corporations which have paid the entrance tax and received permits to do busi-

¹⁵ *Norfolk, etc., Railroad Co. v. Penn.*, 136 U. S., 114-118; *Paul v. Virginia*, 8 Wall., 168.

¹⁶ *Minn. Railway Co. v. Beckwith*, 129 U. S., 268.

¹⁷ *Smythe v. Ames*, 169 U. S., 468.

¹⁸ *Pembina Mining Co. v. Pennsylvania*, 125 U. S., 181-188; *Santa Clara v. Southern Pacific*, 118 U. S., 394-6.

¹⁹ 204 U. S., 103.

ness; and that the tax could not be justified under the power to alter, amend and repeal reserved by the State Constitution (of Colorado). But the effect of this decision was greatly restricted by that in *Hammond Packing Company v. Arkansas*,²⁰ where it was held that, as the Constitution of Arkansas authorized foreign corporations to do business in that State subject to the same regulations and with the same rights as those enjoyed by domestic corporations, and the statutes of the State authorized permits to be issued to foreign corporations, subjecting them to the same privileges as domestic corporations on payment of the same fees and on compliance with similar statutory requirements, and the Constitution reserved to the legislature power to repeal, alter or amend charters of incorporation "provided no injustice shall be done to the corporators," it was competent, without impairing the obligation of the contract made with it by the State in admitting it to do business, to enact a statute to prevent all foreign corporations from doing business in Arkansas if they should be members of a trust, combination or conspiracy against trade, whether such trust, pool, combination or conspiracy should effect or was intended to effect prices or rates in Arkansas or not.

"By the Constitution and laws of the State of Arkansas," said Mr. Justice White, in delivering the opinion of the court, "it is said foreign corporations, when lawfully admitted to do business in the State, were entitled to rights equal to those enjoyed by domestic corporations. . . . The chartered right to do a particular business did not operate to deprive the State of its lawful police authority, and therefore the franchise to do the business was inherently qualified by the duty to execute the charter powers conformably to such reasonable police regulations as might thereafter be adopted in the interests of the public welfare. Besides, it is not disputed that the State under its Constitution had a reserved power to repeal, alter and amend charters by it granted, and therefore, even if the impossible assumption was indulged that the grant of the power to do business implied in the absence of such reservation the right to carry on the business in violation of a lawfully regulating statute, the existence of a reserve power leaves no semblance of ground for the proposition. The claim of an irrevocable contract cannot be predicated upon a contract which is repealable. . . . The determination whether the power to repeal, alter or amend was exerted in such

²⁰ 212 U. S., 322-344.

a manner as to be unjust to incorporators, was within the province of the State court to finally decide, unless that power was exerted in such an arbitrary manner as, irrespective of the contract laws, to deprive of some other and fundamental right which was within the protection of the Constitution of the United States."

As a result of the decisions referred to it may be safely asserted that the only limitation upon the powers of the States to exclude foreign corporations entirely from doing business within their territory, or to prescribe such conditions as they may deem proper to the carrying on by them of such business, are, first, that the regulations so prescribed shall not deprive the foreign corporations of property without due process of law, or deny to them the equal protection of the laws; and, secondly, that such regulations shall not amount to an interference with interstate commerce, or with other business of a Federal nature.

In *Hooper v. California*,²¹ Mr. Justice White said:

"The principle that the right of a foreign corporation to engage in business within a State other than that of its creation, depends solely upon the will of such other State, has been long settled. . . . Whilst there are exceptions to this rule they embrace only cases where a corporation created by one State rests its right to enter another and to engage in business therein upon the Federal nature of its business. As, for instance, where it has derived its being from an act of Congress and has become a lawful agency for the performance of governmental or quasi-governmental functions, or where it is necessarily an instrumentality of interstate commerce, or its business constitutes such commerce and is, therefore, solely within the paramount authority of Congress. In these cases the exceptional business is protected against interference by State authority."

In general almost all of the States require foreign corporations to file in an appropriate office copies of their charters and to designate a local agent on whom process may be served. A number of the States require a license to be procured upon compliance with more or less simple requirements, and a license fee to be paid predicated upon the amount of capital to be employed in business within the State. The Constitutions of California, Kentucky, Montana, Utah, Washington and Oklahoma provide that no foreign corporation shall be authorized to do business within the State on more favorable conditions than domestic corporations. Some of the States have restricted the power of

²¹ 155 U. S., 648.

foreign corporations to hold title to land within their borders; thus, in Georgia, a foreign corporation can only own land in the State to an amount not exceeding 5,000 acres;²² in Minnesota to not more than 90,000 square feet, and in Mississippi to a value of not exceeding \$2,000,000. In Iowa a foreign corporation can only hold real estate when acquired in satisfaction of a debt, and must sell it within ten years. In Michigan a foreign corporation cannot hold any land for more than ten years, except such as is actually occupied by it in the exercise of its franchises. The statutes of Missouri require a foreign corporation doing business in that State to procure a license upon application filed with the Secretary of State, accompanied by a copy of its articles of association, "and if it shall appear that such company or corporation could not organize under the laws of this State the license shall be refused."

The laws of that State provide that a certificate of incorporation for a business corporation shall only be granted if the entire capital stock specified in the articles of association shall be subscribed, and one-half paid in in cash; and the courts of that State have sustained the refusal by the State officials to grant a license to a foreign corporation because its entire authorized capital was not subscribed. The laws of Missouri further enact that no foreign corporation organized by residents of Missouri to evade the laws of that State shall be licensed to transact business within the State, and a foreign corporation whose capital stock exceeds \$10,000,000 may only obtain a license if the proportion of its capital stock employed within the State shall not exceed the capital which domestic corporations are permitted to have.²³

An annual franchise tax on a percentage basis, computed on the full amount of the authorized capital stock, is imposed on both foreign and domestic corporations alike by the laws of Alabama, North Carolina and Vermont. A greater tax is imposed upon foreign than upon domestic corporations of the same character in Colorado and Texas. Under a statute of Kansas, requiring "every foreign corporation authorized by the Charter Board to engage in business in this State" to "pay all the fees required by this act to be paid by domestic corporations," the Supreme Court of Kansas has held that a foreign corporation

²² *Civil Code*, Sec. 1849.

²³ *Laws* 1903, p. 121; 1907, p. 168.

doing business in that State which increased its capital stock from seven million to twelve million dollars was obliged to pay a tax in Kansas upon the entire amount of such increase, irrespective of the question of what proportion of the increased capital was employed in business in the State of Kansas.²⁴

In applying a statute taxing foreign corporations upon the amount of capital employed by them within the State, the Supreme Court of Missouri has held that a foreign railroad corporation would be conclusively presumed to have employed in business in that State at least the amount of its capital equal to the minimum capital required of domestic railroad corporations.²⁵

A statute in Massachusetts provides that if a foreign corporation owns or controls a majority of the capital stock of a domestic street railway, gas light, or electric light company, and issues stock, bonds or other evidence of debt based on or secured by the property, franchises or stock of a domestic corporation, unless the issue be authorized by the laws of Massachusetts the domestic corporation may be dissolved by the supreme judicial court.²⁶

The Public Utilities Law of New York forbids any railroad corporation, domestic or foreign, to acquire the stock of a domestic railroad company or common carrier unless authorized by the Public Service Commission, but enacts that no other kind of stock corporation may acquire or hold more than ten per cent of the total capital stock of any domestic railroad company or other common carrier.²⁷

These are only a few examples of particular provisions affecting the right of foreign corporations to carry on business in the States mentioned.

Much legislation has been enacted in various States for the purpose of preventing trusts, pools and combinations in restraint of trade and monopolies. Such was the law under consideration in *Hammond Packing Co. v. Arkansas*.²⁸ Many of these acts are long, involved and abounding in adjectives. Some of them have been more or less effective; most of them have proved ineffective as applied to foreign corporations.

²⁴ *Cudahy Packing Co. v. Denton*, 97 Pac. Rep., 439, rehearing, 99 Pac. Rep., 601.

²⁵ *State ex rel., R. R. Co. v. Cock*, 121 Mo., 348.

²⁶ *Laws* 1903, Chap. 437, Sec. 64.

²⁷ *Laws* 1907, Chap. 429, Sec. 54.

²⁸ 212 U. S.

It has seemed to me that an effective method of legislating on this subject would be to enact that no foreign corporation should be licensed to do business within a State if fifty per centum of its capital stock or upwards was owned or held by any other corporation, domestic or foreign, and that if, at any time after obtaining such a license, more than fifty per centum of the capital stock of such corporation should be acquired by another corporation, the license should be *ipso facto* vacated. The device of the holding corporation is the only thing which has made possible the rapid growth of the great trusts and monopolies, and a prohibition such as that stated would go far towards their destruction. Only companies which owned property, as distinguished from stock in other companies, could carry on intrastate business within States other than that of their incorporation, and very few of the great industrial corporations are directly owners of all or even of the greater part of the property with which they conduct their business. The increasing complexity and variety of regulation and taxation of foreign corporations by the various States in which their business is conducted, has rendered it more and more burdensome and difficult for one corporation to directly own and carry on business in a number of different States. This has led to the organization of domestic corporations under the laws of the respective States where business is to be conducted, the capital stocks of which are held by a "holding company" organized under the laws of that State, whose legislation is most encouraging to such mode of organization. Such is the organization of practically all of the best-known "trusts." A system of disqualifying State legislation such as suggested, while effective for the purpose, would inevitably increase the demand for Federal legislation authorizing the organization of corporations under national law for the conduct of interstate business. Much protection from State interference and discriminatory regulation is already afforded to corporations organized under State laws and engaged in interstate commerce. But more undisputed and clearly defined protection would be secured by national incorporation. In *Pembina Mining Co. v. Pennsylvania*,²⁹ the court said that the only limitation upon the power of the State to exclude a foreign corporation from doing business within its limits, or to exact conditions for allowing it to do business there, arises when the corporation is

²⁹ 125 U. S., 181.

in the employ of the Federal Government, or where its business is strictly commerce, interstate or foreign; and the express company cases,³⁰ the drummers' cases,³¹ and the telegraph cases,³² are familiar instances of decisions by the Supreme Court holding State legislation to be unconstitutional as interfering with the Federal regulation of interstate commerce.

It would, indeed, be rash at this time to suggest a definition of what constitutes interstate commerce. "Transactions between manufacturing companies in one State, through agents, with citizens of another, constitute a large part of interstate commerce" said the court in *Caldwell v. North Carolina*.³³ "Commerce among the States," said Mr. Justice Harlan in the beef case,³⁴ "is not a technical legal conception, but a practical one, drawn from the course of business;" and it was there held that when cattle are sent for sale from a place in one State, with the expectation that they would end their transit, after purchase, in another, and when in effect they did so, with only the interruption necessary to find a purchaser at the stock yards, and when this was a typical, constantly recurring course, the current thus existing was a current of commerce among the States, and the purchase of the cattle was a part and incident of such commerce.

The business of the Danbury hat manufacturers, which was held to be interstate commerce, in *Loewe v. Lawlor*,³⁵ was summarized from the complaint by the court in the following language:

"Plaintiffs were manufacturers of hats in Danbury, Connecticut, having a factory there, and were then and there engaged in an interstate trade in some twenty States other than the State of Connecticut; that they were practically dependent upon such interstate trade to consume the product of their factory, only a small percentage of their entire output being consumed in the State of Connecticut; that at the time the alleged combination was formed they were in the process of manufacturing a large number of hats for the purpose of fulfilling engagements then actually made with consignees and wholesale dealers in States other than Connecticut. . . ."

³⁰ *Crutcher v. Kentucky*, 141 U. S., 47.

³¹ *Norfolk & Western Ry. v. Simms*, 191 U. S., 44; *Rearick v. Penn.*, 203 U. S., 507.

³² *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S., 1.

³³ 187 U. S., 622-632.

³⁴ *Swift & Co. v. United States*, 196 U. S., 375-398.

³⁵ 208 U. S., 274-304.

These cases may be taken as suggestive of the extent of interstate trade or commerce now recognized to be within Federal control.

The power of Congress to create corporations as a means to the exercise of its power to regulate commerce among the several States has been affirmed in the case of a bank for the purpose of carrying on the fiscal operations of the government; of a railroad corporation for the purpose of promoting commerce among the States; of the construction of public highways connecting several States, either roads or bridges.³⁶

If, as the Supreme Court has directly adjudged, Congress has authority, in the exercise of its power to regulate commerce among the several States, to authorize corporations to construct railroads across the States as well as the Territories of the United States, and the power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, why has it not necessarily full power to authorize the formation of corporations to conduct other forms of interstate commerce, not merely transportation, but of that character of interstate commerce dealt with in the Sherman anti-trust law and described in the decisions in the Beef Trust and Danbury Hat Case? Such corporations formed under national law would not be foreign corporations in any of the States, and would therefore be at liberty to transact their business without State permission and free from State interference.

"The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty."³⁷

On this principle, the Supreme Court of Pennsylvania held that the Texas and Pacific Railroad Company, a corporation organized by Act of Congress to construct a railroad from Marshall, Texas, to San Diego, California, having its principal administrative office within the State of Pennsylvania, was not a foreign corporation in that State, and not affected by legislation prohibiting a foreign corporation from carrying on business within that State without first obtaining a license and paying a tax.

"The general government in its relation to that of the several

³⁶ *McCulloch v. Maryland*, 4 Wheat., 316; *Osborn v. Bank of United States*, 9 Wheat., 738; *Pacific Railroad Removal Cases*, 115 U. S., 1; *Indiana v. United States*, 148 U. S., 148; *Luxton v. North River Bridge Co.*, 153 U. S., 525.

³⁷ Bradley, J., in *Claffin v. Houseman, Assignec*, 3 Otto, 130-136.

States," said the court, "cannot be considered a foreign government in the ordinary acceptance of that term. Within the sphere of its delegated powers, its authority extends over all the States of which it is composed, and to that extent it may be said to be identified with the government of each. Hence, a corporation created by the government of the United States cannot, with propriety, be called a foreign corporation."

Of course, many will object to the centralizing tendency of a national law authorizing the formation of corporations to carry on interstate business; but such a law seems to me to be the inevitable result of economic conditions. The business of manufacture and sale, of barter and trade, is to-day conducted on such a vast scale that it cannot be circumscribed by the boundaries of any one State. On the other hand, no one State can effectively grapple with abuses of the vast power which modern conditions have placed in the hands of those who control great corporate enterprises.

If, now, Congress shall enact a law providing for national incorporation to carry on interstate commerce, subject to such restrictions and with such freedom from local State control as Congress shall see fit to prescribe, the State control of foreign corporations, in all probability, will soon cease to be a subject of great importance.

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